No. 11812

In the United States Circuit Court of Appeals for the Ninth Circuit

LEONTY SAVOROFF, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

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STATEMENT OF THE CASE

On the 15th day of October, 1946 the grand jury filed in the District Court for the Territory of Alaska, Third Judicial Division, an indictment charging the defendant with violation of Section 4760, C. L. A., 1933. The charging part of the indictment is correctly set forth in the opening brief for appellant (pp. 1–2). After trial by jury appellant was convicted of manslaughter and after a motion for judgment of acquittal and motion for a new trial had been denied, appellant was sentenced to imprisonment for four years. This appeal in forma pauperis followed.

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (p. 4).

STATEMENT OF FACTS

While a statement of the case is set forth in appellant's brief (pp. 4–8), it is deemed advisable to include in this brief a statement of facts which embraces a few more of the pertinent facts contained in the record. The appellant, Leonty Savoroff, and his wife, Nellie Savoroff, the deceased, were Alaskan natives residing in the little native village of Nikolski. During the period of their married life the appellant and his wife, together with other natives of Nikolski village, were evacuated to Ward Lake near Ketchikan (R. 115). During that period of time appellant and his wife were not getting along too well due to the fact that his wife would sometimes disappear for several days from their home, on which occasions she would sometimes overindulge in the use of liquor, and that at such times her disposition was bad and she would resort to screaming and hollering when defendant would attempt to bring her home (R. 115–116). The appellant and his wife also had many quarrels after their return to the village of Nikolski at which times they would engage in striking each other (R. 145). Defendant had been known to beat up his wife a number of times (R. 95).

On September 28, 1946, the government vessel *Penguin* called at the village of Nikolski for the purpose of returning several of the village natives who had been engaged in sealing activities in the Pribilof

Islands. The returning natives brought with them a quantity of whiskey which they had purchased at Unalaska when the *Penguin* had stopped there en route to Nikolski. Among the returning natives were Willie Ermeloff, who had, himself, bought five quarts of whiskey (R. 117). A number of the natives engaged in drinking the said liquor, including the appellant and his wife, Nellie.

Harvey Bell, manager of the Aleutian Livestock Company, which was a company engaged in the raising of sheep at Nikolski, had resided there for approximately twenty-six months and was well acquainted with most of the villagers (R. 13). Bell, who was in the village on the night in question, attempted to act as a peacemaker in various fights and to help in any way he could to take care of those who had overindulged. His first encounter was with a native whose nickname is Sambo and who was the husband of Christine Dushkin. Sambo was quite drunk and was looking for his wife. He had previously torn part of her clothing off and she had gone up to the Bell's ranch (R. 13). This encounter with Sambo took place at approximately 8:00 or 8:30 in the evening, at which time Sambo broke the kitchen window in the home of Leonty Savoroff. He was becoming so unruly that it was necessary for Bell to strike him and knock him out.

Following this altercation, Bell had to take care of one of his employees, Jake Cheresin, who was also drunk, by taking him home and inducing him to go to bed (R. 14). Upon leaving the home of Jake Cheresin, Bell passed by the appellant's house and

heard a rumpus. There was a lot of screaming and hollering and fighting. Upon entering the appellant's home he discovered Nellie Savoroff with her baby on the floor under the table with the appellant on top of her and apparently choking her, as he had hold of her neck. Bell removed the appellant from his wife, in which struggle the appellant twisted the stove out away from the wall (R. 24), but Bell finally succeeded in breaking his hold and getting him outside, at which time he had a talk with appellant and appellant promised to behave. At about this time Mrs. Bell appeared for the purpose of getting some clothes for Christine Dushkin and her baby (R. 15). The next time Bell saw Nellie was the following day, at which time she was prepared for burial. The body indicated that it had been beaten pretty badly, having bruises on the temple, a cut across the nose, discoloration of the breasts and the appearance of a general beaten-up condition. There were also what appeared to be slight finger marks on her throat (R. 16). Bell fixed the time of the fight between Leonty and his wife, to which he testified, as approximately 9:30 or 10:00 (R. 18). Bell had had only a couple of drinks and was not drunk. The fact of his sobriety was also verified by Mrs. Bell (R. 28). Bell's reputation for sobriety was further testified to by Donald Pettit, the young Coast Guardsman stationed at Nikolski. (R. 148).

Mrs. Eva Cheresin, the mother of Nellie Savoroff, testified that her daughter Nellie had had a little drink and had left the mother's home about 10:00 in the evening of September 28, 1946 (R. 46) and that the

appellant left about half an hour later with the baby (R. 47), which was about ten months old (R. 153). Mrs. Cheresin testified further that she next saw her daughter the following day on the floor near the bed in the home of appellant and deceased, at which time she observed that Nellie's hair was all pulled out from the skull, there was a bruise on the temple side of the face and bruise all across the chest (R. 42–43). The appellant told Mrs. Cheresin that he had stayed at home all night with the baby (R. 48).

Fannie Pletnikoff Burton testified that she heard the discussion between Harvey Bell and Sambo (R. 32) and she could tell that Sambo was drinking but couldn't tell if Bell was (R. 35). About 10:30 in the evening she heard crying at Leonty's and she thought it was a woman crying (R. 37). She also heard a disturbance as if chairs were falling around, and the crying continued from 11:00 to 2:00 a. m. (R. 152–153). About 2:00 a. m. Joe Brisnikoff broke the window at Oxenia Krukoff's place where Fannie was staying (R. 33).

Frederick Frohbose, an agent of the F. B. I., who investigated this case several days after the alleged killing, testified that he examined the body of Nellie Savoroff and discovered a bruise on the left temple extending down to the cheek, the left eye swollen, a deep gash over the bridge of the nose, marks around the mouth, faint marks of discoloration on the neck and about a two-inch swelling above the left breast (R. 58). He further testified that the appellant admitted having had the first fight with his wife, that he had had a lot to drink, and that after engaging in the

second fight his wife ended up by the bed. He thought she was asleep and put a blanket over her. He stated that he did not mean to kill his wife. When he woke up, his wife was still on the floor where she had fallen (R. 87–89). Mr. Frohbose further testified that at the time of the investigation the stove was not in its normal position; that it was askew (R. 57).

L. Verne Robinson, Deputy United States Marshal, also testified to the statement made by the appellant that he did not mean to kill his wife; that he did not mean to kill her because he was drunk. When asked what construction he placed upon that statement he testified that he assumed the appellant meant he was fighting with her and she was dead and he didn't mean to kill her (R. 93–94). He further testified in response to questions by the appellant's attorney that he heard that appellant had beaten his wife up a number of times and that she was badly bruised on various occasions.

Donald Pettit, the young Coast Guardsman stationed at Nikolski, testified that on the morning of September 29, 1946, the appellant requested him and Mr. Williams to come up to his house. This was about 8:00 a. m. The appellant's eyes were bleary and he smelled pretty strongly of liquor. Appellant stated he thought his wife had been poisoned. When they went up to the house they found the body lying at the foot of the bed face down and stiff as a board. Her hair was in a mess (R. 38–39).

The appellant, Leonty Savoroff, testified generally as to his activities upon the evening in question; that

he had only had about eight shots; that he wasn't drunk and remembered everything. He further testified that he had no recollection of Harvey Bell's being at his home that evening nor of having promised Harvey Bell to behave himself (R. 140) and that he had no recollection of having a fight with his wife. He testified that upon arriving home from his mother-in-law's place he found his wife on the floor and didn't want to wake her up because he didn't want her to go out and drink any more (R. 141). He denied that he had told Mr. Frohbose that he had hit his wife and denied that he said he didn't mean to kill his wife (R. 138). He testified that Feddie Krukoff came into his house early that morning but denied having had any drinks with Feddie. However, John Fletcher, United States Commissioner at Unalaska, who conducted the inquest into the death of Nellie Savoroff, testified that the appellant was sworn in as a witness at said inquest and testified that he remembered promising Bell he would behave himself. He also testified that both he and Feddie Krukoff had engaged in drinking on the morning in question.

The testimony of Willie Ermeloff, brother-in-law of the appellant, and Christine Dushkin, sister of the appellant, was almost in its entirety directed to the discrediting of the testimony of the witness Harvey Bell in that they testified that Harvey Bell was drunk on the evening of September 28 (R. 109, 128). These two witnesses also testified as to Emil Cheresin's having a swollen hand the next day (R. 110, 119). Both Christine Dushkin and Willie Ermeloff admitted hav-

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ing discussed the case with each other and with the appellant (R. 115, 128).

Dr. Lewis G. Allen, who had heard all of the testimony in the case, stated that the bruises and condition of the body testified to by the witnesses could have been the cause of death. (R. 156.)

ARGUMENT

I

There was no error on the part of the trial court in overruling defendant's motion for a new trial

After a trial by jury the appellant was convicted of the crime of manslaughter. In his argument appellant contends that the Court should have granted his motion for a new trial in that (a) there was not sufficient evidence to establish the corpus delicti, and (b) if there was sufficient evidence to establish corpus delicti, there was not sufficient evidence to find the defendant guilty of the crimes charged.

That corpus delicti must be proved beyond a reasonable doubt before a person can be convicted of a crime is elementary. It is sufficiently established that in homicide cases corpus delicti consists of two elements, to wit: the fact of death and the criminal agency. However, it is also a well-established principle of law that the elements in the corpus delicti may be proven by circumstantial evidence.

Wharton's *Criminal Evidence,* 11th Edition, Volume II, page 1507:

> The general rule in homicide is that the criminal agency—the cause of death, the second element of the corpus delicti—may always be

> shown by circumstantial evidence. Criminal agency is sufficiently shown where a dead body is found with injuries apparently sufficient to cause death under circumstances which exclude inference of accident or suicide.

Page 1508:

> Criminal agency is established by proof of wounds which shortly afterwards were followed by death. *People* v. *Holmes,* 50 Pac. 675. *U. S.* v. *Wiltberger,* Federal Cases No. 16,738.

In the same text at page 230 we find the following language:

> The finding of the dead body establishes the corpus. The finding of such body under circumstances that indicate a crime indicates the delicti or felonious killing.

In Underhill's *Criminal Evidence,* 4th Edition, page 21, Section 18 we find the following:

> No general rule can or should be laid down as to what constitutes proof of circumstances in any particular case. Each case is a rule unto itself and is to be determined upon its peculiar circumstances, but all of the circumstances as proved must be consistent with each other and they are to be taken together as proved.

Appellant contends that there is no evidence as to the cause of the death of Nellie Savoroff. However, an examination of the record does not support that contention. Harvey Bell testified that earlier in the evening on the day of the alleged crime, his attention was attracted to noises coming from the appellant's

house, indicating that there was a fight going on inside. Upon entering he found that Nellie Savoroff was lying under the table and that Leonty, the appellant, was on top of her and fighting her and apparently choking her because he had hold of her neck; that Bell finally succeeded in separating the two. The following day, he testified, he saw the body of Nellie Savoroff laid out for burial; that at that time he observed that "her temple was all bruised and swollen and she had been beaten up pretty bad and she had a bad laceration—cut—across her nose. Her breasts were all discolored where she had been beaten. She was just in a general beat up condition, plainly speaking." (R. 15–16).

Fannie Pletnikoff Burton testified that on the evening in question she heard crying coming from the house of appellant Leonty Savoroff, (R. 33) and that she first heard the crying about eleven o'clock P. M. and that it could be Nellie's but she wasn't sure. Later, under redirect examination she testified that she thought it was a woman crying, that it sounded more like a woman than a baby's voice (R. 37).

Donald Pettit testified that at approximately eight A. M. on the morning of September 29 he went to the home of the appellant, that he saw the body of the deceased lying in the bedroom by the foot of the bed, that the body was face down and stiff as a board and that her hair was in a mess (R. 38–39). Pettit further testified that there was no doctor in the village (R. 39).

Mrs. Eva Cheresin, the mother of the deceased, testified that she also saw Nellie on the morning in question

and that at the time she saw her, the deceased was on the floor with covers over her and that she removed the covers, that she felt the body and it was cold, and that with the assistance of other women she prepared the body for burial. She further stated that the side of the deceased's face was bruised and her chest had bruises on it and that her hair was pulled out of her skull, that there was a bruise at the left temple at the side of the face and below the temple there was a bruise, that the bruise was all across her chest.

Fred Frohbose, an agent for the Federal Bureau of Investigation, who arrived in Nikolski about October 3, testified that he examined the body of the deceased, at which time it was laid out as prepared for burial at the Savoroff home, and that he observed a bruise on the left temple which extended down to the cheek, the left eye was swollen, there was a deep gash over the bridge of the nose. There also seemed to be some marks around the mouth and very faint marks on the neck. There appeared to be a discoloration of the neck. Above the left breast there seemed to be approximately a two-inch swelling that was not normal (R. 57–58).

Dr. Allen, who was present during all of the testimony, stated that blows sufficient to cause the bruises, testified to by the witnesses, on the body of the deceased, were sufficient to cause death (R. 156).

The foregoing testimony as to the condition of the deceased's body was certainly sufficient to establish the fact that death was caused through the criminal agency of another person. It certainly could not be seriously contended that the wounds appearing on the

body of the deceased were self-inflicted. Appellant, in his argument, states that accidental death could be argued, but he makes no serious contention on this point and such contention, if made, would be contrary to the evidence. It is true that Dr. Allen testified that it was possible that a woman, while drinking, could fall and strike her head and that death could result, and he further answered in response to a question by counsel for appellant that it was possible that death could be caused by considerable consumption of large quantities of liquor. But there is no evidence to support either of these theories. On the contrary, the only evidence as to the sobriety of the deceased was that of Eva Cheresin, the deceased's mother, who testified that at the time deceased was at Mrs. Cheresin's, she had only a little drink (R. 49).

Nowhere in the record does it appear, either by inference or otherwise, that Nellie Savoroff had consumed sufficient liquor to bring about a condition that would cause death, so that the suggestion made by counsel as to other causes of death other than through criminal agency are based purely on speculation. That fact being true, there was ample circumstantial evidence from which the jury could draw an inference that a crime had been committed.

Underhill's *Criminal Evidence,* 4th Edition, page 45, Section 37, we find this language:

> Corpus delicti and all the elements thereof may be proved by circumstantial evidence, from which the jury may reasonably infer that a crime has been committed. Such evidence must exclude every reasonable hypothesis except guilt

and be convincing to a moral certainty, and such proof of corpus delicti must be the most convincing and satisfactory proof compatible with the nature of the case. The order in which the different material facts are introduced is unimportant when showing corpus delicti, but circumstances and each particular circumstance need not be conclusive.

In the same work at page 1069, Section 546, we find this language:

> There is no presumption of the cause or manner of death. The cause and manner of death are always relevant and material in the prosecution for homicide. The cause of death may be proved by circumstantial evidence. If the corpus delicti is proved, it is not necessary to show the particular manner in which the killing occurred.

Vol. 26, *American Jurisprudence,* Homicide, Section 500, page 506:

> Ordinarily it is within the province of the jury to pass upon the sufficiency of the evidence, circumstantial or direct, offered to prove the corpus delicti. *Jordan* v. *State,* 142 Southern 665. *Ausmus* v. *People,* 107 Pac. 204. *Levering* v. *Commonwealth,* 117 Southwestern 253. *State* v. *Barnes,* 85 Pac. 998.

Section 462, page 476:

> According to modern authority, however, direct and positive evidence is not essential. It is now well established that aside from statutory requirements the elements constituting corpus delicti in a homicide case may be sufficiently proved by presumptive or circumstan-

tial evidence where that is the best evidence obtainable. *State* v. *Farnham,* 161 P. 417. *State* v. *Gillis,* 53 Southeastern 487.

Section 326, page 376:

> The state, in a homicide case, in discharging the burden upon it of proving the corpus delicti, may, according to the weight of authority, where direct evidence is not available, establish the elements of the corpus delicti including the fact of the death of a person alleged to have been murdered, as well as the criminal agency of the accused and the identity of the deceased by circumstantial evidence which tends to establish the fact of death and the agency of accused in causing death.

In the case before us, an examination of the record, of course, supports the fact that the death of Nellie Savoroff had occurred, and appellant makes no contention to the contrary.

In *Gibson* v. *Territory,* Supreme Court of Arizona, 68 Pac. Reporter 540, in which case the deceased was not attended by a physician and no autopsy was held, the Court stated:

> That death was produced by criminal act of the appellant was strong presumptive evidence. There was the proof of facts and circumstances from which the criminal agency could be justly inferred. The law permits it to be so established for, as observed by an eminent jurist, "Until it pleases providence to give us the means beyond those our present facilities afford of knowing things which occur in secret, we must act on presumptive proof or let the worst crimes go unpunished."

State v. *Burner,* Supreme Court of Oregon, 85 Pac. 998.

> The consumption of a human body by fire does not necessarily repel an inference of suicide or of an unintentional death, for the dissolution may have been caused by purposely leaping or accidentally falling into a fire or by being unable to escape from a burning building. So too the human body may be destroyed by that means after death had resulted from natural causes. The finding of the remains of a healthy body like Graham in a burning log heap where escape was possible in case contact with the fire was accidental and where probably immediate intense pain resulting from the flame would cause an abandonment of an attempt of self-destruction, must necessarily repel every inference of death by means of such a fire.

Choate v. *State,* 160 Pac. 34.

> To prove the corpus delicti is a very simple matter. If a dead body is found with marks of violence upon it or other circumstances that indicate that deceased came to his or her death by unnatural or violent means, the proof of such fact established the corpus delicti in a murder case.
>
> Direct and positive proof is not essential to establish the corpus delicti but it may be proved by circumstantial evidence and when it is proved by circumstantial evidence, the question should be submitted to the jury along with the other questions of fact in the case as to whether or not the State has established the corpus delicti beyond a reasonable doubt.

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Thompson v. *State,* 42 Southwestern 974.

> It is true that the wound was not probed but the result and effect of said wound are sufficiently manifested by the fact that coincident with its infliction the deceased who was evidently up to this time a strong and healthy man immediately collapsed and fell as though having received a fatal stroke. To say that this wound was not the immediate and proximate cause of death of the deceased it occurs to us would be puerile.

Mayfield v. *State,* 49 Southwestern Reporter 742.

> It was suggested in argument that no medical expert testified that the death resulted from the wound and that on this account the proof is insufficient to render a conviction. The proof is that up to the time the deceased received this wound he was in good health and able to engage in his usual occupation. It is not suggested in the proof that he died from any other cause or that his death could have been super-induced by any other cause. We held in the case of *Lemons* v. *State,* 97 Tennessee 560, 37 Southwestern 552, a capital case, that it is not essential that the state should, in a murder trial, prove by expert testimony that the death resulted from the wound when there is no suggestion of death from any other cause and the deceased is shown to have been previously in good health and that he received proper medical treatment.

Parks v. *State,* 63 Southwestern (2) 301.

> With reference to these exhibits, there was given testimony by persons familiar with the scene of the tragedy which testimony was avail-

able to the jury in forming their conclusions with reference to whether the tragedy was due to accident or criminal agency. The photographs make evident the fact that where the place it was claimed the deceased was fishing there was a ledge of rock covered by a few inches of water which extended out into the lake for a considerable distance before reaching the point where the water was deep. From this testimony, together with exhibits attached, the jury was able to obtain a more accurate knowledge of the conditions at the time of the tragedy than can be portrayed by the mere words found in the written record. The verdict of the jury implies that the theory of the state as shown by the photographs and as explained by witnesses who testified at the trial was accepted by the jury as being legitimately before the jury and susceptible of the conclusion for which the state contends, namely, that the physical facts exclude the probability of accident. We deem the evidence to which we have referred such as justified the jury in concluding that the death of the deceased was not due to accident or suicide but to the act of appellant.

State v. *O'Brien,* 26 Northwestern 752. Opinion of the Court:

It is suggested that the verdict is not supported by the evidence and that it is not shown that the death of Stocum resulted from the injury inflicted by defendant. The evidence shows that deceased had not been in good health for several months. About three weeks before the assault in question, he consulted a physician

who found his heart in a diseased condition and treated him for heart difficulty. He improved steadily under that treatment until the assault was made. If this testimony at the preliminary examination and his dying declaration were correct, he was choked and kicked and otherwise cruelly maltreated by defendant. It is certain he was greatly excited by the encounter. The medical testimony showed that his condition and failing health after the assault and his death were natural and probable results of his condition, * * *. It was the province of the jury to determine whether the wrongful act of the defendant caused or contributed to the death. The fact that he was afflicted with a disease which might have proved fatal did not justify the wrongful acts of defendant or constitute a defense in law, nor did ignorance of the defendant toward the condition of the deceased Stocum excuse his acts. We think the evidence sufficient to sustain the verdict and find no error prejudicial to defendant to which he can complain.

Payne v. *Commonwealth,* 159 Southwestern (2) 430. Opinion of the Court:

The chief argument is that the Commonwealth, having the burden, failed to prove that Helton's death resulted from the blow delivered by appellant. This contention, according to appellant's counsel, is fortified by the testimony of Dr. Clifton. The examination of the doctor was less than perfunctory. He merely said that he discovered no marks or wounds on the body. This evidence is neither prosecutive or conclusive on the jury. Here the uncontradicted

proof is that Payne delivered a blow which he says knocked Helton down. He fell backward, his head striking the surface of the black top road. Payne and his friends walked away under the belief that Helton was merely knocked out. There is no showing that Helton regained consciousness after falling. He was carried to a nearby gas station and shortly thereafter died. There were no intervening causes. It is true that corpus delecti consists of two essential elements. First the death of the person and second the existence of some criminal agency causing death. The latter must be established by satisfactory evidence and this evidence may be circumstantial. There must be established such circumstances as from which the Jury may draw a reasonable inference that a crime has been committed. In fact, the circumstances in the instant case sufficiently show that the moving cause of Helton's death was the blow delivered by the hand or fist of the accused. On the whole case, we conclude that there was no error on the trial which deprives appellant of any of his rights.

People v. *O'Connell,* 29 New York Supplement 195. Opinion of the Court:

This evidence was uncontradicted except as to the possibility suggested by the counsel for the defendant on cross-examination of the miscarriage being brought on by some cause other than shown by the evidence. It is clear that a cause sufficient to bring a result being proven and no other cause being shown to have existed is a sufficient basis for the conclusion that the result arose from the known cause rather than from some cause the existence of which there is

> not the slightest evidence to establish. If, when a sufficient cause to bring a result is proven, it is necessary to negative every other contingency which might produce the same result, convictions for crimes of violence would certainly be a rarity. It was not only evidence which justified the jury in finding that this assault was the reason for the miscarriage but the evidence absolutely compelled such a conclusion and no man could arrive at any different result who is guided by any experience.

Parovich v. *United States,* 205 U. S. 86. The case originated in the Third Judicial Division, Territory of Alaska.

> While in this case there was no witness to the homicide and the identification of the body found was not perfect owing to its condition by its having been partially burned, yet as the circumstantial evidence was clear enough to warrant the jury in finding that the body was that of a person alleged to have been murdered and that he had been killed by defendant, the trial court would not have been justified in withdrawing the case from the jury but properly overruled a motion to instruct a verdict of not guilty for lack of proof of corpus delicti.

Other cases which support the principle that cause of death can be established by circumstantial evidence are:

Rutledge v. *State,* 15 Pac. 2d 255.
Scott v. *State,* 47 Southwestern 531.
Patton v. *State,* 80 Southwestern 86.
Dial v. *Commonwealth,* 109 Southwestern (2) 41.

Morris v. *State,* 191 Northwestern 717.
Baker v. *State,* 11 Southern Reporter 492.

Appellant has cited a number of cases in support of his contention that the corpus delicti must be established. However, with few exceptions, the cases cited merely state that fact as a principle of law, and several of the cases cited by appellant which go further than a bare statement of the law, can be distinguished from the present case on several different grounds. In *State* v. *Fisher,* 288 Pac. 215, Appellant's Opening Brief, page 13, a case in which the defendant had contended that the corpus delicti had not been proved, the Court stated:

> That corpus delicti must be proved beyond a reasonable doubt before a person can be convicted of a crime is elementary, but that the corpus delicti can be proved by circumstantial evidence is equally well-established in this State by authorities above cited. (*State* v. *Weston,* 201 Pac. 1085. *State* v. *Brinkley,* 104 Pac. 893, 105 Pac. 708).

Coleman v. *Commonwealth,* 138 Southwest 2d 333, App. Op. Br. p. 14. There was sufficient evidence to support the contention that the deceased had been run over by a car rather than beaten to death. *Harris* v. *State,* 124 Southern 493, App. Op. Br. p. 14. The fact of the death of the victim was never established and a new trial was ordered on those grounds. In *State* v. *Roush,* 120 Southeastern 304, App. Op. Br. p. 15, it was contended that the cause of death was not proven. However, at page 308, the Court stated:

> We are not unmindful of the rule that a verdict cannot be disturbed where evidence is suffi-

> ciently conflicting to warrant a difference of opinion; that the jury may make reasonable inferences from facts well-established; and that the weight of evidence and credibility of witnesses is peculiarly within their keeping and finding.

Appellant has further cited *State* v. *Cobo,* 60 Pac. 2d 952, App. Op. Br. p. 13, which case he uses to support a mere definition as to what constitutes the corpus delicti. However, an examination of that case will indicate that the Court went much further. At page 954 we find the following language:

> The evidence is sufficient to show that whatever violence was inflicted on the body of the deceased was inflicted from blows struck by defendant in the encounter or fight, the Fact of death being shown and evidence to show that the cause thereof was from blows struck by defendant sufficiently established the corpus delicti, the body of the alleged crime. * * * But the testimony of the physicians who made the autopsy is to the effect that the subdural hemorrhage, the immediate cause of death, could be and probably was produced from the infliction of violence as shown by the character of the bruises and contusion on the chin, on the back of the head, and on the face of the deceased. That is, the force and extent of violence inflicted to produce such character of bruises and contusions could and probably did produce the subdural homorrhage. We think the corpus delicti was sufficiently established.

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> That a blow struck by the fist to the chin or jaw might, under certain circumstances, cause death, cannot be disputed.

People v. *Ives,* 110 Pac. 2d 408, App. Op. Br. p. 14. It is deemed advisable to set forth at greater length the Court's opinion in that case.

> (3–5). The corpus delicti may be proven by circumstantial evidence, and the reasonable inferences drawn therefrom. To warrant a conviction it must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom. If a prima facie case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient. *People* v. *King,* 213 Cal. 89, 1 P. 2d 15; *People* v. *Selby,* 198 Cal. 426, 245 P. 426; *People* v. *Vertrees,* 169 Cal. 404, 146 P. 890; *People* v. *Wilkins,* 158 Cal. 530, 111 P. 612; *People* v. *Bonilla,* 114 Cal. App. 219, 299 P. 784; *People* v. *Wagner,* 21 Cal. App. 2d 92, 68 P. 2d 277.

From the foregoing citations by both appellee and appellant, it is submitted that the appellee has sufficiently proven the corpus delicti under the tests prescribed therein.

We now turn to the second contention of appellant that the plaintiff, or appellee herein, has failed to introduce sufficient evidence to justify the verdict of

the jury finding the defendant guilty of the crime charged.

In addition to the facts above set forth with reference to the corpus delicti, the record reveals the following:

The witness Harvey Bell testified that he heard fighting in the appellant's house and a lot of screaming and hollering; that upon entering, he found the appellant's wife lying down under the table and that the appellant was on top of her and fighting her and apparently choking her because he had hold of her neck, that the witness Bell separated the two and that in the struggle the stove was pulled away from the wall (R. 15) and that after talking to appellant and his wife, appellant promised he would behave (R. 16). This altercation took place at approximately 9:30 in the evening of September 28 (R. 19). Mrs. Lois Bell, who appeared on the scene shortly after appellant and his wife had been separated by her husband, testified that she gathered from the conversation between her husband and the appellant that there had been some difficulty between the appellant and his wife and that the appellant had promised to behave himself (R. 27). Later in the evening, at approximately 10:30, Fannie Pletnikoff Burton testified that she got home from church and that she heard someone crying in the home of appellant from about 11:00 o'clock to approximately 2:30 o'clock in the morning (R. 33, 152). She further testified that it was either a baby or a woman's voice, but it sounded more like a woman; that the baby was a tiny baby about ten months old. All of this crying came from the home

of the appellant. This witness also testified that at approximately 2:00 o'clock in the morning she heard a noise like chairs falling around or something like that (R. 152).

It will be remembered that Eva Cheresin, the deceased's mother, testified that Nellie left her place about 10:00 the evening in question and that the appellant left about a half hour later with his baby (R. 47). This testimony places the appellant in his home with his wife and baby at approximately the time that a witness, Fannie Pletnikoff Burton, first heard the crying. The appellant, himself, stated to Mrs. Cheresin that upon his arrival home after leaving her place, he had slept with his child in the same house all night (R. 48–49).

According to Frederick Frohbose, an agent of the Federal Bureau of Investigation, the appellant admitted to him that he had the first fight with his wife, that is, the fight that was interrupted by Mr. Bell, and that later in the evening he returned from his mother-in-law's house, where his wife had been, and upon going home engaged in another fight with his wife and that, while he was rather vague as to the fight itself, he did state that his wife ended up by the bed and he thought she was asleep so he put a blanket over her, that he then went to bed himself and went to sleep with the child (R. 87–88). He stated that he did not mean to kill his wife, that he had been drinking heavily and everything was vague in his mind and that he didn't know what he was doing (R. 89).

L. Verne Robinson, a Deputy United States Marshal who assisted Mr. Frohbose in investigating the case, also had a conversation with the appellant, Leonty Savoroff, and testified to substantially the same facts as those given by Mr. Frohbose—that the appellant had stated that he had had a fight with his wife which had been interrupted by Mr. Bell. Appellant further made the statement in Robinson's presence that he did not mean to kill his wife and that he had been drinking (R. 93–94).

While there is some question about the competency of the evidence, it was brought out by a question to Mr. Robinson by appellant's counsel that someone had stated to him, perhaps the deceased's mother, that appellant had beaten her up numerous times, that there had been numerous fights between the appellant and his wife, and that she was badly bruised on various occasions (R. 95). It will further be noted that Mr. Frohbose corroborated the testimony of Mr. Bell to the extent that the stove had been pulled away from the wall, that the stove was sitting askew at the time he made his investigation (R. 57).

It is submitted that from the foregoing facts there is ample evidence from which the jury could legally infer that a crime had been committed and that appellant was guilty of committing such crime, and it is evident from the verdict of the jury that they made such inferences from the facts proven. It is true that there were no eye witnesses to the second encounter between the appellant and his wife, but there is certainly sufficiently strong circumstantial

evidence which, when taken together with admissions made by the defendant himself, justified the jury in entertaining an opinion that the appellant was guilty beyond any reasonable doubt. That the jury has the right to draw inferences from a proven set of facts is well settled.

In *Wilson* v. *United States,* 162 U. S. 613 at page 640 the Court declares:

> Again, the existence of blood stains at or near a place where violence has been inflicted is always relevant and admissible in evidence. *Wharton Criminal Evidence,* Section 778; *Commonwealth* v. *Sturtivant,* 117 Mass. 122. The trial judge left it to the jury if they found that there were blood stains and that the defendant has not satisfactorily explained them, to draw the inference in the exercise of their judgment that it was an act of deadly violence perpetrated against a person while upon or connected with the bed clothing; in other words, that the jury might regard blood stains not satisfactorily explained as a circumstance in determining whether or not a murder had been committed.

It is contended by appellant that there is no testimony that appellant struck his wife on the night of September 28, 1946. However, the evidence does not support such contention. Unless the testimony of Harvey Bell and his wife are to be disregarded entirely, we have an eye witness to the first encounter on the evening of September 28, 1946, at which time the appellant was physically interrupted in his acts of violence toward the deceased (R. 24).

In addition to that testimony we have the further evidence, as testified to by many of the witnesses, as to the condition of the deceased's body. The nature of the bruises themselves would indicate that blows had been administered on the body and face of the deceased. These facts, when taken together with the appellant's admissions as testified to by witnesses Frohbose and Robinson, are sufficient to establish the fact that appellant did strike his wife.

In *People* v. *Ives,* 110 Pac. 2d 408, which has previously been cited in this brief and which was also cited by appellant, we find under Headnote 10, in the Court's opinion, the following language:

> (10) The corpus delicti having been proven sufficiently, irrespective of the testimony of the defendants, certain statements made by each were admissible in evidence over objection by them. A search of the record does not disclose any ground upon which an objection could have been properly sustained. If any possible error appeared in the reception in evidence of the statements, such error was rendered harmless by each defendant voluntarily appearing on the witness stand and testifying relative to the same matters. *People* v. *McLachlan,* 13 Cal. 2d 45, 87 P. 2d 825.

It will be further noted that not only was such evidence as to the statements of appellant admissible, but no objections were interposed by appellant as to the admission of such evidence. It is true that there is no direct testimony as to what prompted appellant to attack his wife. However, it is submitted that there

is evidence from which it can be logically inferred that the trouble was caused by the fact that appellant did not want his wife going out and drinking. During the period of time that they were in Ketchikan, appellant and his wife had had differences in this respect.

The witness, Willie Ermeloff, testified for the defense (R. 115):

> Q. And while you were there did you have occasion to observe the conduct of the defendant's wife, Nellie Savoroff? A. Yes, She * * * at times she used to go downtown and get to drinking and then she failed to come home and at times stayed away from home as long as a week or more.
>
> Q. Then what would happen after that? A. Well, finally Leonty would locate her and he would bring her home. Sometimes she would be drunk. Sometimes she would be sober when he brought her home.

As to the fatal night in question, we find the appellant himself testifying from the stand as follows:

> And I landed by the beach there and I went straight home to take my boots off and I went in there and my wife was ready to—with a white cloth to baptize baby girl and I see her—she was drinking already so I told her not to look for drink. She said "Yes" (R. 132).

On cross-examination appellant testified as follows:

> Q. Is your wife in the habit of sleeping on the floor at night? A. No, she never does.

> Q. Well, then, don't you think it was rather unusual that she was sleeping on the floor that night? A. I just don't want to wake her up because a lot of boys had drinks. She never stays home * * *.

The Supreme Court has touched upon this type of evidence in *Thiede* v. *Utah Territory,* 159 U. S. 510, pages 517, 518:

> Now the most of the testimony objected to was introduced for the purpose of showing ill treatment by defendant of deceased, and a state of bitter feeling between them. This, of course, bears on the questions of motive, and tends to rebut the presumed improbability of a husband murdering his wife. The witnesses testified to hearing the deceased scream at several times; to seeing her with black eyes and a bruised face; to her eyes looking red; to her crying on several occasions, and appearing alarmed and scared, and to bruises and discolorations of her body. The objection was that these witnesses did not connect the defendant with these appearances, or testify that he was the cause of them. It is true these matters do not constitute direct evidence of ill treatment or a long-continued quarrel, but they are circumstances which, taken in connection with the testimony of what was seen and heard passing between the defendant and his wife, were fairly to be considered by the jury in determining the truth in respect thereto. Whether the relations between the defendant and his wife were friendly or the reverse was to be settled, not by direct or positive, but by circumstantial evidence, and any circumstance which tended

> to throw light thereon might fairly be admitted in evidence before the jury. *Alexander* v. *United States,* 138 U. S. 353; *Holmes* v. *Goldsmith,* 147 U. S. 150; *Moore* v. *United States,* 150 U. S. 57. In the second of these cases, page 164, this court observed: "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be."

All of this evidence was entitled to go to the jury for their consideration under proper instructions from the Court. *Hickman* v. *Jones,* 76 U. S. 197, p. 201:

> It is as much within the province of the jury to decide questions of fact as of the Court to decide questions of law. The jury should take the law as laid down by the Court and give it full effect by its application to the facts, and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law.

That the rights of the appellant were fully protected under proper instructions by the Court is revealed by an examination of such instructions. Particular attention is directed to Instructions No. 5 (R. 161), No. 5–A (R. 163) and No. 7 (R. 164).

II and III

The Court did not err in denying the motion of the defendant made at the close of the Government's case for judgment of acquittal. The Court did not err in denying the motion of the defendant for a judgment of acquittal at the conclusion of the trial

The arguments on these two assignments of error are presented together by appellant (App. Op. Br. p. 20) and they will be so treated here.

While it is believed that all three assignments of error by appellant could be treated under the same argument, inasmuch as appellant has seen fit to present further argument under the present assignments, it will be briefly treated in that manner here. It is requested that the facts and citations previously set forth in this brief under assignment of error No. I be also considered and incorporated under the present assignments of error.

The appellant dwells at some length upon the testimony to the effect that the appellant stated "he didn't mean to kill his wife," and he submits a number of citations that such statements are not sufficient to prove the corpus delicti unless there is other evidence of proof thereof. This contention can be briefly disposed of by referring to the facts and citations previously presented by appellee in this brief to the effect that there is ample evidence corroborating the declarations of appellant. The most that can be said of appellant's contention in this respect is that it was argument to be considered by the jury, who were the triers of the facts. It was within their province to determine what construction should be

placed upon appellant's declaration. It was for them to consider what appellant meant by such statement. That there could be an honest difference of opinion as to what the appellant meant is borne out by appellant's own argument when he gives the following question and answer by the government witness, Mr. Robinson:

> Q. Do you mean—think he meant he didn't mean to kill his wife in the way you or I would say it, or do you think it was that he was using an idiom of speech—in his unfamiliarity—"if I killed her I didn't mean to"?
>
> A. If I would attempt to attach a meaning to his words I would assume he meant he was fighting with her and she was dead and he didn't mean to kill her. (App. Op. Br. p. 23.)

It is submitted that the witness Robinson, a Deputy United States Marshal, can be considered as a man with a reasonable mind, and if he placed that particular interpretation upon the appellant's statement, it cannot be logically argued that twelve other people who are presumed to have reasonable minds could not be permitted to indulge in the same construction.

Appellant has apparently seen fit, deliberately or otherwise, to ignore entirely the further statement by the appellant to the witness Frohbose that the appellant admitted having had the first fight with his wife, that he had had a lot to drink, and that after engaging in the second fight his wife ended up by the bed; that he thought she was asleep and put a blanket over her; that he stated he did not mean to kill his wife (R. 87–89).

The propriety of appellant's argument contended in his opening brief at page 22 as to the testimony relative to a statement signed by the appellant is seriously questioned. All of such testimony was given in the absence of the jury (R. 61) in order to determine the admissibility of such statement. Upon the completion of the examination as to the admissibility of the statement, the Court denied its admission (R. 86). From an examination of the record (R. 61–86), there is a grave question as to whether or not the Court erred in refusing to admit the statement into evidence. However, inasmuch as it was not admitted, it cannot be properly used as a basis for argument by appellant, and whatever value it might have, if any, is a question with which we are in no wise here concerned.

The appellant's case consisted in substance of his denial, while upon the witness stand, of all of the pertinent facts to which the government witnesses testified. The balance of his defense consisted of an extremely weak attempt to fasten the blame for the death of deceased upon one Emil Cheresin, and other testimony going to the credibility of the government witness, Harvey Bell. So, in effect, we have on one hand the contention by the appellant that he had nothing whatever to do with his wife's death, and on the other hand, testimony by the government witnesses from which it could be inferred that the appellant was criminally responsible for the death of his wife. Under such conditions it was a matter for the jury to determine the guilt or innocence of the appellant.

Murray v. *United States*, 288 Federal 1008. Under Headnote 16 of the Court's opinion we find the following:

> At the close of the evidence the defendant again moved for a directed verdict and argues here that it should have been granted because the evidence was not of such a character that reasonable men could see beyond a reasonable doubt that defendant was guilty. The defense was that decedent's death was accidentally caused by the defendant in repelling a threatened assault upon him by her. His evidence tended to show that a quarrel arose between them that night because she was not willing to let him go out; that when he persisted in doing so she approached him in a threatening manner as if to strike, whereupon he struck her near the eye but not with any weapon; that she immediately fell and struck upon something which gave her the mortal wound; that the rocker was the only thing he saw that could have caused it; that he did not intend to kill her or inflict serious bodily harm; that she was addicted to the use of intoxicating liquors; that he did not have a stick in his hand the night of her death; that he never threatened to kill her or to throw her out of the house; that they had fights; that his weight was about 103 and hers about 115 pounds.
>
> We are unable to agree with counsel for defendant that on the whole evidence the Court was required or would have been justified to grant the motion of the defendant. As was

said in *Burton* v. *United States,* 202 U. S. 344, where a like motion was under consideration:

> "There was beyond question evidence tending to establish on one side the defendant's guilt of the charges preferred against him, on the other side his innocence of those charges. The trial court was not authorized to take the case from the jury and direct a verdict of not guilty. That could not have been pursued consistently with the principles that underlie the system of trial by jury."

That the jury did not attach a great deal of weight to the testimony attempting to involve Emil Cheresin as the guilty party is obvious from their verdict, which is justified by the record itself. Appellant, himself, testified that Emil Cheresin was at his mother-in-law's on the evening in question and that there was some struggle between himself and others over a small suitcase. It can further be gathered from his testimony that Emil Cheresin was present at the home of Eva Cheresin, the mother-in-law, during the period of time between the departure of the deceased, Nellie Savoroff, and the appellant (R. 135).

A further significant fact in this connection is the testimony of the deceased's mother, Eva Cheresin, to the following effect concerning the swollen hand of Emil Cheresin:

> Q. Did you notice his right fist? A. He showed me his right hand and said it was swollen and I looked at it. It was swollen but he did not tell me how he done it (R. 51).

It seems contrary to all legitimate reasoning that had Emil Cheresin been implicated in the death of

her daughter, he would have voluntarily shown his swollen hand to the deceased's mother. The appellant could no doubt have produced evidence indicating that any number of men in the village of Nikolski, following the evening of celebration on September 28, 1946, had swollen hands or other evidence of having been involved in fights. We submit, however, that any such defense is testing the credulity of the jury to the breaking point.

The jury was the sole judge as to the credibility of the witnesses, both for the government and the defense. That they preferred to believe the testimony of Harvey Bell rather than that of the appellant and other witnesses for the defense is not difficult to understand from the facts of the case, particularly when it is seriously contended by appellant that Bell's testimony should be discredited because, among other things, he had indulged in two drinks and that the appellant's testimony should be given more weight although, by his own admission, he had had at least eight drinks (R. 131).

Certain parts of appellant's testimony were also discredited by John Fletcher, the United States Commissioner, who held the coroner's inquest into the death of Nellie Savoroff at which inquest the appellant took the stand as a witness.

> Q. Question: You do remember Mr. Bell asking you not to fight with Nellie and then you promised to behave after that, didn't you? Answer yes. A. That's right.
>
> Q. Question: Do you remember Feddie coming in? A. Yes, Feddie asked for a drink. I

didn't have any so Feddie gives me drink. We both drink, then we drink some more.

Q. You recall that question and answer? A. I believe I do.

The credibility of the witnesses Willie Ermeloff and Christine Dushkin were also discredited to some extent. Willie Ermeloff testified that although he had brought five quarts of whiskey with him to Nikolski (R. 124), he didn't drink himself because of his physical condition and that he had only had one little drink last winter. However, the witness Bell testified that he admitted having been drinking on the evening in question (R. 150). Bell further testified to the fact that he had seen a bulletin posted in the village of Nikolski, signed by Willie Ermeloff, to the effect that Willie had promised he would not drink any more and that he would not beat his wife any more and that he would not make any raisin jack any more or any alcoholic beverages of any shape or form (R. 151).

It was also proper for the jury to take into account the interest that any of the witnesses might have in the case. There can be no question as to the appellant's interest in the outcome of the case, and the fact that Willie Ermeloff was a brother-in-law of the appellant and that Christine Dushkin was appellant's sister were facts for the jury to consider with reference to the credibility of the witnesses.

In reviewing all of the evidence presented, the verdict of the jury must be sustained if there is substantial evidence taking the view most favorable to the government to support it. *Glasser* v. *United States,* 315 U. S. 60. *Borgia* v. *United States* (C. C. A. 9),

78 Federal 2d 550, 555. *Henderson* v. *United States* (C. C. A. 9), 143 Federal 2d 681, 682. *Suetter* v. *United States* (C. C. A. 9) 140 Federal 2d 103, 107. *Hemphill* v. *United States* (C. C. A. 9) 120 Federal 2d 115, 117.

Viewed in the light of the rule above stated, the case was properly submitted to the jury. In considering the question of request for a directed verdict, the Court in the case of *United States* v. *Morley,* 99 Federal 2d 683 stated:

Page 685.

> (5) On the other hand, let it be said, defendant has not necessarily established a case for a directed verdict in his favor by professing innocence and denying the existence of criminal intent. If the established facts and inescapable inferences are inconsistent with the accused's professions of innocence, it becomes the problem of the jury to weigh the evidence and determine, under proper instructions dealing with quantum of proof necessary to convict, the guilt or innocence of the accused.
>
> (6) The existence of guilty knowledge and the presence of a criminal intent are not matters provable with the certainty that facts may be established by documentary proof. No X-ray picture will reproduce and reflect the state of the accused's mind. Only by weighing the acts of the accused against his professions of innocence when they are inconsistent, can the fact-finding body reach an intelligent verdict or finding. If the accused's acts and assurances are reconcilable, then no jury question is presented and the defendant should be dismissed. If,

> however, there be irreconcilability—if the acts of the accused dispute his assurances of innocence and the conflict is vital, then the court must let the jury weigh the conflicting evidence and decide.

The following case is also cited in this connection, and it is set forth at some length because it goes into the question here involved rather thoroughly and is a well reasoned opinion. *Curley* v. *United States* (1947) 160 Federal 2d 229.

Page 232.

> It is true that the quoted statement seems to say that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And it also seems to say that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. Like many another rule become trite by repetition, the quoted statement is misleading and has become confused in application.
>
> (2–6) The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sym-

pathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

Pages 232, 233.

(7–9) The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he con-

cludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.

Page 237.

(12, 13) The decision in the case rests squarely upon the rule of law governing the action of the trial judge upon the motion for directed verdict of acquittal and the action of an appellate court upon a verdict of conviction. We agree, as Curley contends, that upon the evidence reasonable minds might have had a reasonable doubt. As much might be said in many, if not in most, criminal cases. The jury, within the realm of reason, might have concluded that it was possible that Curley was merely a figurehead, that he had complete faith in Fuller, that he never asked any questions, that he was never informed as to the contents of the contracts with customers or the financial statements or the use of the money; in short, that it was possible that he was as much put upon as were the customers. If the jury had concluded that such was a reasonable possibility, it might have had a reasonable doubt as to guilt. But, as we have stated, that possibility is not the criterion which determines the action of the trial judge upon the motion for directed verdict

and is not the basis upon which this court must test the validity of the verdict and the judgment. If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury. If we ourselves doubted Curley's guilt, that doubt would be legally immaterial, in view of the evidence and the rule of law applicable.

CONCLUSION

Appellant had a fair and impartial trial and there was sufficient evidence to support the verdict of the jury. The Court, in its instructions and rulings on motions made by the defense, acted fairly and with justice. No reason whatever exists for upsetting the verdict of the jury, which heard all of the evidence presented by both the government and the appellant, and which had an opportunity to observe the demeanor and determine the credibility of all the witnesses, and found appellant guilty as charged. It is respectfully submitted that the judgment of conviction should be affirmed.

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